Petition

81-1075

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. .....

KENNETH W. SHERROD. *Petitioner*

VS.

CLINT C. MEYERS. T.P. POLICH. POLICH-BENEDICT CONSTRUCTION CO., INC., T.P. POLICH and POLICH-BENEDICT CONSTRUCTION CO.: *Respondents*

Petition for Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

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QUESTION PRESENTED

1. Whether an employee whose discharge is upheld by a grievance committee under a collective bargaining agreement which provides that the decision is final and binding upon all parties as to the matters submitted is collatterally estopped from state court civil trial of factual issues involving circumstances of his discharge alleged not to be submitted or decided by the grievance committee where there is no transcript or record of the grievance proceeding or expanded opinion of the issues submitted or decided by the grievance committee?

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Petition for Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

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Petitioner Kenneth W. Sherrod, petitions for a Writ of Certiorari to review the judgement of the Court of Appeal of the State of California in and for the Third Appellate District in the above entitled case.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California for the Third Appellate District, hereafter called the District Court of Appeal, is not officially reported. It is reprinted in Appendix A to this Petition. The Supreme Court of California denied a Petition for Hearing in an order without opinion.

JURISDICTION

The decision of the District Court of Appeal affirming the trial court's summary judgement order was issued on June 9, 1981. A timely Petition for Hearing was thereafter filed in the Supreme Court of California. The Petition for Hearing was denied without opinion on August 19, 1981. The jurisdiction of this court is invoked under 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

1. Whether an employee whose discharge is upheld by a grievance committee under a collective bargaining agreement which provides that the decision is final and binding upon all parties as to the matters submitted is collatterally estopped from state court civil trial of factual issues involving circumstances of his discharge alleged not to be submitted or decided by the grievance committee where there is no transcript or record of the grievance proceeding or expanded opinion of the issues submitted or decided by the grievance committee?

STATEMENT OF THE CASE

Petitioner's complaint in the Superior Court was in two causes of action. (C.T. p.1).

The first cause of action was against Respondent Myers for negligence of a fellow employee not involving bodily injury to petitioner nor entitling petitioner to workers' compensation benefits, but proximately causing petitioner to wreck the truck on June 30, 1972, and proximately causing petitioner loss of earnings. (C.T. pp.1-4).

The remaining cause of action was in defamation for publishing the statement that petitioner was discharged for wrecking a truck on June 30, 1972. Petitioner alleged the innuendo of this publication was that he was a negligent teamster truck driver when in fact respondents were responsible for wrecking the truck by failure to repair, and that the publications of such an unnuendo was harmful to his future employment. (C.T. p.4-5).

[1] References to Clerk's Transcript are cited C.T.

A. The Facts

Respondent, Clint C. Myers, was a general superintendent for the remaining respondents. (C.T. p.2).

Petitioner was an employee of said defendants, except Defendant Myers. (C.T. p.2).

For more than two weeks prior to June 30, 1972, petitioner informed respondent Myers that the steering mechanism of a 1968 truck tractor operated by petitioner locked when in a hard right turn and demanded that said respondent cause inspection, repair and adjustment forthwith. (C.T. p.3).

Respondents refused to cause the steering mechanism to be forthwith, inspected, repaired and adjusted, in an outrageous disregard for the safe operation of the truck tractor. (C.T. p.3).

Petitioner was operating said ten wheel truck tractor on U.S. Interstate 80 in Yolo County on June 30, 1972, and by reason of the defective steering and outrageous failure to inspect, repair and adjust the same, said truck tractor was proximately caused to leave the roadway, turn upside down and sustain damage. (C.T. p.3).

Petitioner was not injured as a result of the accident and was not entitled to workmen's compensation benefits. (C.T. p.3).

As a result of the accident petitioner was discharged by respondents. (C.T. p.3).

Petitioner's Discharge Notice from defendants stated the following: "You are hereby discharged for wrecking truck #145A on this date." The date of said discharge was June 30, 1972. (C.T. p.65).

Petitioner was a member of Local Union No. 150 affiliated with the International Association of Teamsters (C.T. pp. 3-4).

Said Local Union was a member of a "Committee" of Local Teamsters Unions that had a Teamster Agreement with the Associated General Contractors effective at the time of the accident governing terms and conditions of petitioner's employment. (C.T. p.23).

This collective bargaining agreement provided under Section

7: "No employee shall be discharged or suspended without just cause." (C.T. p.30).

The said collective bargaining agreement further contained a grievance procedure providing that if the Union and Employer are unable to resolve a dispute, it shall be referred to a Board of Adjustment. (C.T. p.32).

The Board of Adjustment was composed of two members appointed by the "Committee" of local Unions, and two members named by the "Association" and an impartial arbitrator if the two Committee and two Association members could not agree to resolve a dispute by a majority vote. (R.T. p. 32-33).

The grievance procedure further provided in Section 15. (8) as follows:

> "Decisions of the Board of Adjustment or of an Impartial Arbitrator shall be within the scope and terms of this Agreement and shall be final and binding upon all parties hereto, *provided such decision is specifically limited to the matter susbmitted and does not amend any provisions of this Agreement." (C.T. p.33).*

The collective bargaining agreement provided under Section 15:

"(b) No briefs shall be submitted nor a transcript made of the hearing except by mutual agreement of the parties."

"(c) . . . . The Arbitrator shall not render an expanded opinion in any case unless mutually requested by the parties."

There is no record on appeal of the Board of Adjustment proceeding nor whether there was an impartial arbitrator.

The petitioner's declaration in opposition to summary judgment alleged that he was present at the Board of Adjustment hearing on July 18, 1972, and that the steering defect was not able to be confirmed until after the hearing because the truck was not repaired at the time of hearing. (C.T. p.73, 78).

Petitioner's declaration alledged that other background was permitted to be heard by the Board of Adjustment in addition to the truck accident of June 30, 1972, to sustain his discharge.

These other background matters alleged in petitioner's declaration included allegations by respondents that:

In May, 1972, petitioner lost a trailer and a cat.

On May 9, 1972, respondents received written complaint alleging petitioner tailgated.

Petitioner had been ordered to obey all safety laws. (C.T. p.1).

Petitioner's declaration in opposition to summary judgment alleges that there was not in issue at the Board of Adjustment hearing the following:

Whether respondent Meyers negligently failed to maintain the truck?

Whether failure by respondents to maintain the truck proximately caused the wreck?

What was the derogatory meaning of petitioner's discharge notice published by respondents?

Whether the respondents had reasonable grounds to believe the innuendo of the derogatory publication was true? (C.T. p.75-77).

The Union of the petitioner represents petitioner in all Board of Adjustment grievence procedures (C.T. p.32).

The Union representatives were biased against Petitioner as were Union representatives on the Board of Adjustment by reason of Petitioner's pending legal action against his Union and business agent. (C.T. p.87). Said pending action ultimately resulted in a verdict in Petitioner's favor in the amount of $175,000. (C.T. p.87). The honorable United States Supreme Court refused to grant certiorari in said action in February, 1980. *Chauffers, Teamsters and Helpers Local No. 150, Joint Council of Teamsters No. 38, and George LaBrasca v. Kenneth W. Sherrod. No. 79 - 869.*

The activities of the parties to the collective bargaining agreement affect interstate commerce.

California follows the comparative negligence doctrine. *Li v. Yellow Cab Co.*, 13 Cal. 3rd 804 (1975).

B. Proceeding Below

Petitioner filed this action in June, 1975, in the California Superior Court for Sacramento County. The trial court entered Summary Judgment in favor of Respondents, ordering that petitioner take nothing by his complaint on September 1, 1977. (C.T. p.119). The Summary Judgment order was determined on declarations. The California practice allows Summary Judgment without trial or testimony if the trial court determines there is no triable issue of fact. California Code of Civil Procedure, Section 437 (c).

Notice of Appeal was filed on October 31, 1977, but the decision was not issued by the District Court of Appeal until June 9, 1981. The District Court of Appeal held that Summary Judgment was proper. The District Court of Appeal determined that "in reality plaintiff's first cause of action (negligence of a fellow employee) was based on wrongful discharge . . . that the decision of the committee (Board of Adjustment) shall be final and binding." The District Court of Appeal further determined the "hearing before the Board of Adjustment established as a fact that plaintiff (petitioner) wrecked the truck and this was cause for discharge" and that "truth was a defense to the defamation asserted in the second cause of action." (Parenthesis undersigned) (App. A, p.16).

The District Court of Appeal acknowledged "There is no record of the hearing before the Board." (Board of Adjustment). The District Court of Appeal further held "By obvious inference the Board (Board of Adjustment) necessarily determined that Sherrod (Petitioner) was responsible for wrecking the truck and "wrecking the truck" was just cause for terminating his employment." (Parenthesis undersigned) (App. A, p.14).

Petition for Hearing in the California State Supreme Court was timely filed on July 20, 1981. The State Supreme Court denied a hearing on August 19, 1981. However, the Remitter to the County Clerk includes the following: "Bird, C.J. is of the opinion that the petition should be granted."

C. Presentation of the Federal Question in Proceeding Below

The same question presented in this Petition For Writ of Certiorari was presented to the California State Supreme Court in the Petition For Hearing. Petition For Hearing, p.2.

REASONS FOR GRANTING PETITION

1. The Labor Management Relations Act permits suit for violation of a collective bargaining agreement may be brought in Federal Court. 29 U.S.C. § 185. Where agreements and activities of the parties affect interstate commerce, state courts exercise concurrent jurisdiction with federal courts. *Dowd Box Co. v. Courtney*, 368 U.S. 502. (1962).

2. The Labor Management Relations Act authorizes the federal courts to create a body of federal law for the enforcement of collective bargaining agreements. *Textile Workers Union v. Lincoln Mills* 353 U.S. 448, 456-457. The California Supreme Court has declared that where state courts exercise concurrent jurisdiction with federal court they must, in adjudicating an action which could have been brought in federal courts under the Labor Management Relations Act apply federal substantive law. *O'Mally v. Wilshire Oil Co.*, 59 Cal. 2d 482, 486 (1963); *Butchers' Union Local 229 v. Cudahy Packing Co.*, 66 Cal. 2d 925, 930-931 (1967).

3. Where a union has breached its duty of fair representation, the policy of promoting finality of the arbitration award does not preclude a judicial action by the employee to enforce the collective bargaining agreement. *Margetta v. Pam Pam Corporation* 501 F.2d 179 (9th Cir. 1974).

4. Where new evidence discovered after the arbitration hearing sustaining a discharge of truck drivers for dishonesty cleared the truck drivers who were represented by their Union at arbitration, the finality of the arbitration provision in the collective bargaining agreement was not a bar to enforcement of the agreement in civil court where the union representative made

no effort and could have ascertained the facts with a minimum of investigation. *Hines v. Anchor Motor Freight* 424 U.S. 554 (1976).

5. There is no record of the Board of Adjustment (grievance committee) disclosing whether or not the issue of negligence of petitioner's fellow employee, Respondent Myers, was submitted to the Board, nor whether there was an impartial arbitrator. The only record of the Board of Adjustment is petitioner's declarations:

a. That his discharge for wrecking truck #145A on this date (June 30, 1972) was sustained on July 18, 1972:

b. That the issue of respondent Meyers' negligence in failing to maintain the truck was not submitted;

c. That the issue of respondent Myers' failure to maintain the truck was a proximate cause of wrecking the truck was not submitted:

d. That the derogatory meaning of the discharge notice nor the truth thereof was not submitted;

e. That the Board of Adjustment considered other matters than wrecking truck #145A, including that petitioner lost a trailer and a cat in May, 1972, respondents received a complaint petitioner tailgated on May 9, 1972, and that petitioner was ordered to obey all safety laws.

6. The Third District Court of Appeals in California, despite the lack of the Board of Adjustment (grievance committee) record; treated petitioner's complaint as one for "wrongful discharge". The District Court of Appeals despite the lack of said record and the declaration of petitioner regarding the steering defect on his truck causing the accident was not able to be confirmed until after the Board hearing, and that the Union representing petitioner at the Board hearing, as well as the Union Board members, were biased against petitioner; held the Board of Adjustment (grievance committee) decision as final and binding and precluded petitioner from litigating in State Court any of the circumstances surrounding his discharge.

7. Assuming for purposes of argument that petitioner's cause of action is for wrongful discharge, the District Court of Appeals incorrectly applied the applicable federal law regarding binding grievance committee decisions under the facts alleged and undisputed as set forth in *Hines v. Anchor Motor Freight*, supra., and *Margetta v. Pam Pam Corporation*, supra. as said court was required. Petitioner was thus deprived of state civil court trial remedy for his wrongful discharge granted under federal law and decision.

8. The grievance committee decision on applicable federal law is not a bar to an action in the state or federal court where the Union has not fairly represented the discharged employee and where the Union could investigate and determine with little effort the true cause of an employee disharge but failed to do so. A failure by the employee to attempt to vacate the grievance procedure does not bar the civil action. *Hines v. Anchor Motor Freight*, supra. The fact that the employer may have been innocent of subverting the grievance proceedings does not bar an action in the state or federal court by the employee if the Union has not represented the employee in good faith at the grievance proceedings. *Hines v. Anchor Motor Freight, supra.*

9. It is common knowledge that collective bargaining agreements providing for binding grievance committee arbitration in the event of employee grievances are widespread in the United States. However, binding grievance committee arbitration has to be fair, in good faith and limited to the issues submitted. A discharged employee should not be collaterally estopped from a state or federal court trial remedy when he alleges the issues he seeks to litigate were not submitted or decided by the grievance committee, and where there are no findings of the grievance committee to dispute his allegations. The fundamental right to continued employment and economic well being of a discharged employee, as well as the integrity of the grievance process, should require the prcedure of grievance committee findings before a discharged employee is collaterally

estopped from attacking the circumstances of his discharge alleged not to be decided by the grievance committee.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

November 1981

JOHN C. WEIDMAN
Attorney for Petitioner

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COPY

In The Court of Appeal of the State of California
In and for the Third Appellate District

(Sacramento)

KENNETH W. SHERROD, Plaintiff and Respondent, v. CLINT C. MEYERS, T.P. POLICH, POLICH-BENEDICT CONSTRUCTION CO., INC., T.P. POLICH and POLICH-BENEDICT CONSTRUCTION CO., Defendents and Appellants.	3 Civ. 143147 (Super.CT. No. 175600)

Plaintiff appeals from summary judgment. His "complaint for damages" alleged in the first cause of action that he had been discharged from his employment as the proximate result of defendants' negligence; and alleged in the second cause of action that defendants had defamed plaintiff. The following facts are undisputed. Plaintiff was an employee of defendant Polich-Benedict Construction Company, Inc., for whom he operated a ten-wheel truck-tractor owned by the employer. On June 30, 1972, while operating the truck-tractor, the vehicle left the roadway, turned upside down and sustained damage. Plaintiff was uninjured, and received no workers compensation benefits. The same day he was given notice of discharge "for wrecking the truck . . . "

Plaintiff was a member of Local Union 150, Heavy Highway Building and Construction Teamsters of Northern California, which was party to a collective bargaining agreement (hereinafter

"Agreement") with the defendant employer.[1]

Section 7 of the Agreement provides: "The employer shall be the judge of the qualification of all his employees and may on such grounds, discharge any of them.

No employee shall be discharged or suspended without just cause. In the event of discharge or suspension without just cause, the employee may be reinstated with payment for time lost."

Pursuant to section 15 of the Agreement, delineating the grievance procedure, plaintiff's discharge was referred to the Board of Adjustment (herinafter "Board").[2]

Section 15(8) of the Agreement provides: "Decisions of the Board of Adjustment or of an Impartial Arbitrator shall be within the scope and terms of this Agreement *and shall be final and binding upon all parties hereto,* provided such decision is specifically limited to the matter submitted and does not amend any provisions of this Agreement." (Emphasis added.)

In his declaration, plaintiff states "the issue at said Board of Adjustment Hearing was whether I was discharged in violation of Section 7 of the Contract without just cause" and "the decision of the Committee was the discharge should be sustained."

There is no record of the hearing before the Board. Section 15(5)(b) of the Agreement provides there shall be no transcript made of the hearing except by mutual agreement of the parties, and the Arbitrator shall not render an expanded opinion in any case unless mutually requested by the parties.

By obvious inference, the Board necessarily determined that Sherrod was responsible for wrecking the truck and that "wrecking the truck" was just cause for terminating his employment. Under the terms of the Agreement this decision was final.

[1] The Master Agreement is incorporated by reference in plaintiff's declaration opposing motion for summary judgment, and is contained in the appellate record.

[2] The Board is composed of two members of the Heavy Highway Building and Construction Teamsters Committee for Northern California, two members of the Associated General Contractors of California, Inc., Engineering and Grading Contractors Association of California, Inc., and the Northern California Homebuilders Conference, and an impartial arbitrator.

Plaintiff states his first cause is not for wrongful discharge, but "for negligence of a fellow employee (Respondent, Clint C. Myers), in outrageous failure to maintain the truck defendant was driving as an employee of respondent, and as an approximate [sic] result said truck was wrecked while operated by Appellant, *which caused Appellant's discharge by respondents with resultant damages* but not physical injury entitling Plaintiff Workers Compensation benefits." (Emphasis added.)

The contention that the "first cause of action is not for wrongful discharge" is specious. Although predicated on a theory of negligence of a co-worker, in reality the first alleged cause of action is based on plaintiff's wrongful discharge and damages resulting therefrom.

"[W]here there has been an arbitration award and decision under the labor contract grievance and arbitration procedure . . . fully adjudicating the dispute, that decision is final and binding on the parties and employees involved and precludes further litigation of the controversy on its merits." (Archuleta v. Grand Lodge Etc. of Machinists (1968) 262 Cal.App.2d 202, 208.) "The committee itself, by the express language of the collective bargaining agreement, is the chosen instrument for the definitive settlement of grievances between the parties, and it is entirely competent for them to agree, as they have, that the decision of the committee shall be final and binding. Where such is the case, it is not open to the courts to reweigh the merits of the controversy." (Cortez v. Cal. Motors Express Co. (1964) 226 Cal.App.2d 257, 261; see Park v. Board of Trustees (1971) 21 Cal.App.3d 630, 632-633; A. Teichert & Son, Inc. v. State of Cal. (1965) 238 Cal.App.2d 736, 746.) The decision of the Board in this case is binding and not subject to judicial review.[3]

The second cause of action alleges plaintiff was defamed by certain oral and written statements to the effect that plaintiff wrecked the truck. The hearing before the Board of Adjustment

[3] "It is now settled that in the absence of a claim that a board such as respondent here acted arbitrarily, capriciously, or in bad faith in reaching its decision, such action is final and not subject to judicial review." (Park v. Board of Trustees, supra, 21 Cal.App.3d at p. 633.)

established as a fact that plaintiff wrecked the truck and this was cause for discharge. (See Conner v. Dart Transportation Service (1976) 65 Cal.App.3d 320, 323-324.) Truth is a defense to the defamation asserted in the second cause of action; therefore the trial court properly determined that the defendants are entitled to judgment as a matter of law. (P. 324.)

Plaintiff further contends that defendant Clint C. Meyers was not a party to the Agreement and therefore the Board's decision has no effect as to Myers. It is true that plaintiff alleged and defendants admitted that Myers was a "general superintendent, a class specifically excluded from the definition employees covered by the Agreement. However, the complaint alleges that "At all times herein mentioned defendant Clint C. Myers . . . was acting within the purpose and scope of his employment and agency for said defendants."

The Board's determination that plaintiff's employment was terminated for just cause and by his own acts in damaging his employer's equipment inferentially excludes any other cause for his discharge. Plaintiff is bound by the Board's finding that he was not wrongfully discharged. He is therefore precluded from recovering damages for wrongful discharge, which he seeks against Myers. Since he has alleged no actionable injury, summary judgment was proper. (See Katcher v. Home S. & L. Assn. (1966) 245 Cal.App.2d 425, 430.)

The judgment is affirmed.

CARR, J.

We concur:

REYNOSO, Acting P. J.

PERLUSS, J.*

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* Assigned by the Chief Justice.

Opposition

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

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QUESTION PRESENTED

May a Federal right which must be specially set up or claimed under the statutes of the United States be presented and specially set up for the first time by way of a Petition for Writ of Certiorari to the United States Supreme Court instead of being first and properly presented to and considered by a lower court?

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

JURISDICTION

Petitioner Kenneth W. Sherrod (hereinafter Sherrod or Petitioner) seeks to invoke the jurisdiction of this Court under 28 USC § 1257(3), evidently claiming that he was denied some "title, right, privilege or immunity which was specially set up or claimed under the . . . statutes of . . . the United States." (28 USC 1257(3).) Respondents respectfully contend there is no basis for jurisdiction in this case under 28 USC 1257(3).

STATEMENT OF THE CASE

A. Facts

Prior to June 30, 1972, Sherrod was employed by Respondent Polich-Benedict Constructors as a truck driver (Clerk's Transcript, [hereinafter C.T.] pg. 101). He was a member of Teamster's Local No. 150 and covered by a collective bargaining agreement between the union and his employer (C.T., pp. 15, 21-64).

On June 30, 1972, Sherrod was discharged by Polich-Benedict Constructors (C.T., pg. 65). Petitioner filed a grievance with his union grievance committee asserting he was discharged without just cause (C.T., pg. 69). Petitioner's union represented him at a Board of Adjustment hearing[1] wherein it was determined that Petitioner was discharged for just cause and that the discharge be sustained (C.T., p. 74).

On June 29, 1973, after his discharge had been sustained by the Board of Adjustment, Sherrod filed his Complaint in the Superior Court alleging that he had been defamed and that the *negligence* of Respondent Meyers proximately

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[1]The collective bargaining agreement provides for a Board of Adjustment to arbitrate grievances between union members and the employer (C.T., pg. 33). The board consists of two union representatives, two employer representatives and an impartial arbitrator selected by agreement of the union and management representatives (C.T., pg. 33). The collective bargaining agreement provides that decisions of the Board of Adjustment " . . . shall be deemed final and binding upon all parties." (C.T., pg. 33.) Under California law, proceedings before the Board of Adjustment are essentially arbitration proceedings, see, e.g., *Cortez v. California Motor Express Co.* (1964) 226 Cal.App.2d 257; *Conner v. Dart Transportation Service* (1976) 65 Cal.App.3d 320.

caused Sherrod to be discharged by Respondent Polich-Benedict Constructors (C.T., pp. 1-6).[2] On September 1, 1977, a Summary Judgment was entered in favor of Respondents (C.T., pp. 117). Sherrod appealed to the Court of Appeal of the State of California for the Third Appellate District on October 31, 1977, which affirmed judgment for the Respondents on June 9, 1981.

In affirming the judgment of the lower court, the Court of Appeal stated that "in reality the first alleged cause of action [of Sherrod's complaint] is based on plaintiff's wrongful discharge and damages resulting therefrom." (See Petitioner's Brief for Certiorari at 15.) The appellate court concluded that the decision of the Board of Adjustment in the instant case was binding and not subject to judicial review (id., at 15). On August 19, 1981, the California Supreme Court denied a hearing to Petitioner Sherrod.

B. Presentation of the Federal Question

It is Respondents' contention that Petitioner Sherrod has not properly presented a Federal question. Having failed to present a Federal question in the proceedings below, Respondents suggest that Sherrod now improperly seeks to invoke the jurisdiction of this Court.

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[2]California law recognizes a cause of action for intentional interference with contractual relationships. However, Respondents are not aware of a doctrine of law permitting recovery based upon *negligent* interference with a contract of employment.

Sherrod's basis for Supreme Court jurisdiction is presented in an ambiguous and circuitous fashion. For purposes of clarity, Respondents propose to state Sherrod's jurisdictional basis as it is understood by counsel.

Sherrod still contends that he was wrongfully discharged. A wrongful discharge constitutes a breach of a collective bargaining agreement and is thus a violation of the federal Labor Management Relations Act (29 USC §§ 141, et seq., hereinafter LMRA). The LMRA § 185 provides for federal court jurisdiction, with the states exercising concurrent jurisdiction. Sherrod then cites California cases for the propostiion that where state courts exercise concurrent jurisdiction with federal courts they must, in adjudicating an action which could have been brought in federal courts under the LMRA, apply federal substantive law. (Petitioner's Brief for Certiorari at 7.) Sherrod indicates that the federal substantive law which should have been applied in the instant case is set forth in *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976) (Petitioner's Brief, id., at 9).

In summary, it appears to be Sherrod's contention that the adverse adjudication in the courts below denied him a right, privilege, or immunity under the statutes of the United States because he *could* have brought a suit under the LMRA and *Hines v. Anchor Motor Freight* (id.) *would* have been determinative in such an action.

ARGUMENT

28 USC § 1257(3) allows for Supreme Court review by way of Writ of Certiorari ". . . where any title, right, privi-

lege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, the United States." It appears that the Federal right which Sherrod claims is in question is that granted by the LMRA (29 USCS §§ 141, et seq.). The major flaw in Sherrod's petition for review in the instant case is that his claim was not specifically set up or claimed in the state court as required by 28 USC 1257(3) and case law.

The U. S. Supreme Court has often and emphatically stated that it will not decide issues which are raised for the first time in the Supreme Court. *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86, 97, 29 S. Ct. 220 (1909); *Cardinale v. Louisiana,* 394 U.S. 347, 439, 89 S. Ct. 1161 (1969); *Tecon v. Arizona,* 410 U.S. 351, 352, 93 S. Ct. 998 (1973). Sherrod has directly contradicted this principle by presenting an alleged violation of a Federal right for the first time in his Petition for Writ of Certiorari. Neither the trial court, the state appellate court nor the state supreme court were given the opportunity to consider Sherrod's claimed Federal right. Sherrod's Complaint in the Superior Court alleges that he was wrongfully discharged but he asserts no claim based upon an alleged violation of the LMRA.

The first assertion of a cause of action based upon an alleged violation of the LMRA appears in Sherrod's Petition for Writ of Certiorari. By proceeding in this fashion, Sherrod has denied the entire echelon of state courts the opportunity to hear his claim and rule on its merits. Concomitantly, he fails to demonstrate to the U. S. Supreme Court how or why a Federal right has allegedly been denied him.

The Supreme Court, as noted above, has repeatedly required that the Federal question review sought by Writ of Certiorari be presented first for consideration by the lower courts. This is a sound requirement. The Court must be able to see clearly from the whole record that an Act of Congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied (*Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U.S. 626, 633-634, 20 S. Ct. 205 (1900)). Questions which are not raised in the lower or state courts are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind (*Cardinale v. Louisiana*, 394 U.S. at 439). The end result is that the lower courts are deprived of the opportunity to render a relevant and complete legal decision and the Supreme Court is denied adequate information from which to determine what error, if any, has been committed.

The Supreme Court recognized the necessity of presenting matters for review in a proper manner very early on:

> "In order to be available in this court some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or laws or treaties of the United States. . . . A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it." (*Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904 cited in *Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U.S. at 634.)

Furthermore, Sherrod's alleged Federal right or claim cannot be asserted by way of mere inference. The law

requires that Sherrod's Federal right be alleged distinctly and positively so as to place it beyond doubt that he is intending to assert a Federal right (*Union Mutual Life Insurance Co. v. Kirchoff,* 169 U.S. 103, 18 S. Ct. 260 (1898)). As the Supreme Court succinctly stated:

> "A point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment which is silent upon the question is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of." (*Keokuk & Hamilton Bridge Co. v. Illinois,* 175 U.S. at 634-635.)

In fact, the principle of "first and proper" Federal right presentation is so important, the Supreme Court has said that,

> "where the highest [state] court fails to pass upon a federal question, it will be assumed that omission was due to want of proper presentation in state courts, unless the aggrieved party in the United States Supreme Court can affirmatively show the contrary." (*Street v. N.Y.* 394 U.S. 576, 582, S. Ct. 1354 (1969).)

Petitioner is a litigant who evidently came to the conclusion only after an adverse adjudication on the merits in the courts below that he might have presented his case to greater advantage under a different theory of liability. Under the authorities cited above, however, he should not be allowed to begin anew, more than nine years later, relying upon allegations made for the first time in the Supreme

Court of the United States which could and should have been made in the courts below.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated January 18, 1982.

Respectfully submitted,
LITTLEFIELD, MCDERMAND
& MCPOIL
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By GEORGE K. LITTLEFIELD